IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.592 OF 2006

In

NOTICE OF MOTION NO.116 OF 2005

In

INSOLVENCY NOTICE NO.N/112 OF 2005

Anilkumar Sushilkumar Ruia & Anr. : Appellants

(Orig.Judgement Debtors)

V/s.

Ex parte

Kotak Mahindra Bank Ltd. : Respondent

(Orig.Judgement Creditor)

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Mr.Pradeep Sancheti with Mr.Jay Choksi i/b. M/s.C.R.Naidu & Co., for the appellants.

Mr.Kishore Jain with Ms Deepa Mehta i/b. Mr.G.R.Mehta for the respondent.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : SEPTEMBER 11, 2006.

P.C.

1. We heard the counsel for the appellants and the counsel for the respondent.

2. The counsel for the appellants submitted that the respondent (judgement creditor) did not disclose that the properties of the principal debtor, viz., Unikol Bottles Ltd., lying in security were sold for Rs.10.34 crores in public auction and it chose to adopt insolvency proceedings against the appellants - judgement debtors on 10.6.2005 by suppressing the said material fact. He also contended that the judgement creditor failed and neglected to give credit of Rs.10.34 crores received by it to the appellants. In this connection, the counsel relied upon section 9-A of the Presidency-Towns Insolvency Act, 1909 as amended in the State of Maharashtra.

3. From the facts that have come on record, it is clear that the judgement creditor adopted insolvency proceedings against the appellants - judgement debtors on 10.6.2005. It is an admitted case of the parties that the properties of the principal debtor, viz., Unikol Bottles Ltd. (in liquidation) were sold, pursuant to public auction. The date of auction was notified on 27.4.2005 for 7.6.2005 and that the sale was sanctioned in favour of M/s.ARS Enterprises Pvt. Ltd. on 22.9.2005. It will thus be seen that on the date when the insolvency proceedings came to be adopted by the judgement creditor on 10.6.2005, the sale had not been sanctioned. In these facts, therefore, it cannot be said that there is any concealment or

suppression of facts by the judgement creditor while adopting insolvency proceedings. The ancillary contention in this regard that the amount of Rs.10.34 crores which was realised by the judgement creditor by sale of the properties of the principal debtor was not given credit and that the said amount of Rs.10.34 crores satisfies the entire claim of the judgement creditor. Suffice it to say that the liability of the principal judgement debtor is said to be exceeding the amount of Rs.10.34 crores received by sale of the properties of the principal judgement debtor. The learned single Judge, while dealing with this fact, considered the matter thus:-

> "..... it has been stated that the principal Debtor Company owes Rs.6.54 crores and 12.12 crores alongwith interest to IFCI and IDBI plus Rs.9.99 crores are payable to the State Bank of Patiala as per the judgement passed by the D.R.T., Mumbai dated 31.1.1997 in Suit No.1671 of 1995.
>
> So far as the present Petitioning Creditor is concerned, they have to recover an amount of Rs.5 lakhs with interest.
>
> Considering the total liability, as against an amount of Rs.10.34 crores realized from the sale of the property, it would hardly satisfy the liability of the judgement Creditor."

4. We find hardly any ground to take a different view from that of the learned single Judge in this regard.

5. The counsel for the appellants then submitted that

the Recovery Certificate issued under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 cannot be the basis for proceedings under section 9 of the Presidency-Towns Insolvency Act, 1909, as amended in the State of Maharashtra. Under section 9 of the Presidency-Towns Insolvency Act, 1909, inter alia, a debtor commits an act of insolvency if he does not comply with the insolvency notice of the period of not less than one month issued to him in respect of the decree or order for payment of any amount due to such creditor, the execution of which is not stayed. The counsel submitted that the expression "a decree or order" has to be given the meaning as is given in the Code of Civil Procedure and that the Act of 1993, being a special Act, cannot be made subordinate to the Presidency-Towns Insolvency Act, 1909 by making an order passed therein amenable to the proceedings under section 9. In this connection, the counsel for the appellants relied upon the judgement of the Supreme Court in the case of Allahabad Bank v. Canara Bank (AIR 2000 SC 1535).

6. The counsel for the respondent submitted that the submission of the counsel for the appellants has no merit and is concluded by the judgment of the learned single Judge of this Court in the case of Deepak Cochhar & Anr. v. Indusind Bank Ltd. (2006 (3) Bom.C.R. 520). He

then submitted that the aforesaid judgement in the case of Deepak Cochhar has been challenged in appeal and the said appeal is on board for hearing before us. The counsel for the respondent vehemently submitted that this question need not be examined by us in the present appeal as this argument was never canvassed before the learned single Judge nor the said argument forms part of the grounds set up in the Memorandum of Appeal. He submitted that the appellants shall have adequate opportunity of raising this ground in the petition under section 13 of the Presidency-Towns Insolvency Act, 1909 being Insolvency Petition No.10 of 2006.

7. We considered the submissions of the counsel for the parties in this regard. The counsel for the appellants did not dispute that this contention was not canvassed before the learned single Judge. He also conceded that in the Memorandum of Appeal, such contention has not been set up as a ground. He, however, submitted that the contention being a pure question of law, this Court must consider the aforesaid contention in the appeal. It is true that the contention raised by the counsel for the appellants relates to question of law and, ordinarily, we would have considered the said contention being an issue of law, but in view of the fact that Insolvency Petition No.10 of 2006 under section 13 of the Presidency-Towns

Insolvency Act, 1909 is pending before the Insolvency Judge, it will be open for the appellants to raise this contention in the said Insolvency Petition. Obviously, such contention shall be decided by the Insolvency Judge after hearing the parties, in accordance with law. We, therefore, leave this issue open for consideration by the Insolvency Judge in the petition under section 13 of the Presidency-Towns Insolvency Act, 1909.

8. The appeal does not deserve to be admitted and is dismissed in limine accordingly.

R.M. LODHA, J.

S.A. BOBDE, J.